INDEX.

TABLE OF AUTHORITIES.

Cases:

Statutes:

Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 791.

RONALD L. CRANE,
Petitioner,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

The petitioner, Ronald L. Crane, was injured during the course of his employment by Cargill, Inc. as a mill helper. It was a part of his duties as such employee of Cargill to weigh and spot railroad cars in front of a loading dock at the Cargill plant in the City of Cedar Rapids, Iowa, and then subsequently load such cars with meal for subsequent shipment over the railroad of the respondent. All of these car movements were made by use of an electric winch which turned a cable, which was attached to the railroad cars by means of a steel hook (A. 3). The railroad cars in question were set out on a track, known as the meal house track, at the Cargill plant by the respondent railroad. This meal house track was not owned by the respondent and it did not have any right to direct or control the movement of any railroad cars in the area where the accident oc-

curred. The cars were set out empty on this meal house track at the Cargill plant and that was the end of the railroad's handling of these cars until after they were filled and released by Cargill to the railroad on this track at a place north of the Cargill elevator (A. 111-112).

At the time these cars were set out on the south end of the meal house track, they were all securely coupled together. The petitioner and another Cargill employee uncoupled the two cars which were on the north end of the string for the purpose of taking these two cars to a scale owned by Cargill, which was at a point north of the Cargill loading dock. At the time the second car from the north end of the string was uncoupled from the third car from the north end of the string, the petitioner observed that these cars were then equipped with couplers that were functioning in the usual and ordinary way that couplers were supposed to operate. At that time the winch was applied, the whole string of cars was set in motion, and the pin lifter was lifted up between the second and third car which permitted them to separate. This demonstrated that those cars at that time were equipped with proper couplers which would enable them to be uncoupled without the necessity of anybody going between the cars to uncouple them (A. 32). After the cars were weighed they were brought back from the scale by means of the winch so that they came in contact with this string of cars with sufficient force to move that string back about five feet. At that time the most northerly car was spotted in position to be loaded in front of the loading dock (A. 32-33).

This attempt to recouple the cars was made at a place where there was a sharp curve in the track (A. 42). In order to make a coupling upon such a curve with any degree of assurance that the couplers will couple at the time of impact, it is necessary that the knuckle that opens towards the outside of the curve be open and the knuckle that opens towards the inside of the curve be closed (A.

100-101). There was no evidence that the couplers were placed in this position after the cars were uncoupled for the purpose of being weighed and prior to the time they were brought back together by means of the winch. The usual and ordinary rate of speed at which railroad cars are brought together for the purpose of coupling would be at a speed of between two to four miles per hour, and, if an attempt were made to effect a coupling at a speed of less than two miles per hour, there would be less likelihood of the cars coupling (A. 96).

At the time the cars were brought together for the purpose of being recoupled by means of the winch, their speed at the time of impact was at the rate of about one-half mile per hour (A. 112). After these cars came in contact, the most northerly car was spotted in a position to be loaded and the second car was then further south (A. 33). Petitioner and his co-employee, Harris, then proceeded to load the first car which was spotted in front of the loading dock. After this first car was loaded, they then hooked the cable to the second car in the string. Petitioner then got up on the third car of the string for the purpose of applying the brake to stop the second car when it was pulled into proper position for loading in front of the loading dock. Harris operated the winch. Prior to getting up on this third car, petitioner observed that the knuckles on the coupler were together and appeared to be closed (A. 27). He did not, however, make an observation to see whether the pin had dropped which was essential to securely couple the cars together, and at the time that he got on the third car he couldn't tell whether the pin had dropped (A. 35).

When the cars were started in operation by means of the winch, the first two cars began to move away, but the third car on which petitioner was standing did not move. He then set the brake on this third car, climbed down the ladder, overtook the southernmost of the two moving cars, got up on the brake platform, was engaged in turning the

brake wheel on that car when for some unknown reason he lost his balance. There was nothing that gave way on that car that caused him to fall (A. 35-36). At the time he fell he was probably half a car length south of the winch (A. 36). At that time he was more than two hundred forty-four feet distant from the elevator scales where he thought men were working. The difference in the elevation of the track between the mealhouse dock where he fell and the south side of the elevator shed, which was two hundred forty-four feet distant, was a little less than three inches (A. 110-111). Nobody was, in fact, working in the vicinity of the scale on the night of the accident (A. 82). Petitioner claimed that when these two cars broke away he observed a car in the elevator area and assumed that there might be people working inside who were unloading this car, and that his immediate reaction was to get those cars stopped before they could get to the elevator (A. 26). On the basis of this record, the trial court gave the jury petitioner's requested Instruction which read as follows:

> "When one is confronted with a sudden emergency, not brought about by his own fault, and because thereof is required to act upon the impulse of the moment without sufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as would be required of him if he had time for deliberation. Under such circumstances he is required to act only as an ordinarily, careful and prudent person would act when suddenly placed in a similar position, and if he so acts he is not liable for injury or damage resulting from his conduct."

This instruction is not set out in the Single Appendix filed in this Court, but will be found as a part of the printed Record filed in the Supreme Court of Iowa at page 184, lines 1 to 27. The jury returned a verdict in favor of the respondent railroad.

SUMMARY OF ARGUMENT.

The Federal Safety Appliance Act imposes an absolute duty upon railroads engaged in interstate commerce to protect all persons from dangerous results due to the maintenance or operation of congressionally prohibited defective equipment. The absolute duty imposed supersedes the common law duty of the railroad. The Federal Safety Appliance Act does not, however, create a cause of action in favor of the injured person. The right to enforce the duty arising from a breach is derived from the principles of common law. In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist. When the Federal Employers' Liability Act was first adopted, it gave railroad employees who were engaged in interstate commerce at the time of their injury a right to recover damages due to a violation of the Federal Safety Appliance Act. The Federal Employers' Liability Act specifically provided that no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Until the Federal Employers' Liability Act was subsequently amended, those railroad employees who were engaged in intrastate commerce stood in the position like the members of the public generally and were required to look to the law of the state where the injury occurred to secure a remedy for such injury.

The petitioner, Crane, was not an employee of the respondent. He cannot point to any statute which takes away the defense of contributory negligence in actions brought by non-railroad employees. He was required to look to the laws of the State of Iowa for his remedies. The

Federal Safety Appliance Act did not touch the common or statute law of Iowa governing contributory negligence. The Iowa Supreme Court determined that contributory negligence was available as a defense in this case and that the instructions in this regard were correct.

ARGUMENT.

The Supreme Court of Iowa concluded that contributory negligence was available as a defense in this case and that the instructions in this regard were correct. The basis of this holding was briefly summarized by the Iowa Court as follows:

> "Crane as a nonemployee is not entitled to the benefits of the F. E. L. A. and, as the S. A. A. does not provide a remedy, he brought his action in the state court subject to state law."

(A. 136).

The petitioner on the contrary states:

> "It is our position that this Court's more recent rulings referred to by the Iowa Court correctly express Congress' intent to impose absolute liability regardless of who brings the suit, so long as he is covered by the Act."

I.

Section 2 of the Safety Appliance Act, provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars (27 Stat. 531 (1893), 45 U. S. C., § 2 (1954))."

The case was submitted to the jury on instructions which imposed an absolute duty upon the respondent to comply with the provisions of this statute and told the jury that a violation of the statute would be established if the plaintiff proved each of the following:

"A. That the couplers on the cars were set in a proper position to couple.

"B. That, when the couplers were set in proper position, the cars were brought together with an impact equal to or greater than the impact normally employed by the railroad in coupling cars.

"C. That, when the cars were so brought together they either failed to couple or, having coupled, failed to remain coupled until set free by some purposeful act of control."

(A. 128).

The jury was instructed that, if each of these matters was proven, then it had established that the defendant was guilty of negligence as required. Another instruction told the jury that, if the defendant were negligent as alleged in the Petition, it would be their duty to return a verdict in some amount against the defendant if such negligence were the proximate cause of the injury and the plaintiff were free from contributory negligence, and the plaintiff were damaged. It is evident that the use of the word "negligence" in the instructions is a mere matter of semantics. If the plaintiff established a violation of the statute, that was the end of the inquiry so far as any breach of duty by the defendant was concerned.

The plaintiff testified at the time of trial that, when the railroad cars were first used by him, they were equipped with couplers that were functioning in the usual and ordinary way that couplers were supposed to operate. He observed the cars when they were coupled together and at the time they were uncoupled by lifting up on the pinlifter without the necessity of anybody going between the cars to uncouple them (A 32). The Court instructed the jury, however, in a manner which would not permit them to exonerate the respondent on the basis of any showing of

ordinary care on its part and directed that all the plaintiff was required to prove was that the coupler failed to perform as required by law at the time of the incident in question. The instruction in this respect was as follows:

> "Evidence has been introduced in connection with defendant's claim that the coupler on the railroad car coupled automatically by impact, both prior and subsequent to the time of the accident.
>
> "The fact that the coupler performed perfectly, both before and subsequent to the accident, if such were true, would not constitute a defense if the plaintiff has established by a preponderance of the evidence that this coupler failed to perform as required by law at the time of the incident in question. * * *"

(A. 130-131).

The instructions were correct statements of the law. They properly submitted to the jury those matters which the plaintiff was required to prove in order to establish a breach of duty by the respondent under the Safety Appliance Act. The Court sustained a Motion for Directed Verdict and withdrew from the consideration of the jury all claims which were based upon negligence (A. 91).

II.

The petitioner contends that he should be entitled to recover because this Court should construe the Federal Safety Appliance Act as creating a cause of action in favor of any member of the general public "**so long as he is covered by the Act**" who may be injured as a result of a violation of the Federal Safety Appliance Act. If that result were reached, it would mean that all persons, no matter whoever they may be, who are injured as a result of a violation of the Federal Safety Appliance Act, will be given all the rights, remedies, and benefits which the

Federal Employers' Liability Act confers only upon railroad employees. This result must follow because this Court has previously determined that the Federal Safety Appliance Act was not enacted to protect any particular class of persons, but to "protect all who need protection from dangerous results due to the maintenance or operation of congressionally prohibited defective appliances."

Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 597 (1934);

Coray v. Southern Pacific Co., 335 U. S. 520, 523 (1949).

The liability under the Federal Employers' Liability Act "springs from its being made unlawful to use cars not equipped as required, . . . not from the position the employee may be in or the work which he may be doing at the moment when he is injured * * *."

Brady v. Terminal R. Assoc., 303 U. S. 10, at 16 (1933).

The petitioner cannot claim that the Federal Safety Appliance Act was a statute which was of a type enacted "in order to protect a certain class of persons against their own inability to protect themselves." **Restatement of Torts, Second, 483, Comment c.** The Act, instead, has been construed "so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. Swinson v. Chicago, St. P. M. & O. R. Co., 294 U. S. 529, 531 (1935), * * *." The result is that the petitioner can claim no particular benefits under the Act by reason of being a non-employee who was working on or with a railroad car.

III.

The petitioner argues that the Iowa Supreme Court reached an erroneous conclusion, but admits that in so

doing it "followed statements in earlier decisions of this Court which, at least without reference to their context, seemed to support the railroad's position." We will now direct attention to these specific cases.

Schlemmer v. Buffalo R. & P. Ry. Co., 220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596 (1911), was the first case which came before this Court in which the question was directly presented as to whether contributory negligence was available as a defense in an action of this kind. In that case the accident occurred after the adoption of the Federal Safety Appliance Act, but prior to the effective date of the Federal Employers' Liability Act. That case, like the present, involved a violation of what is now 45 U. S. C., Section 2. The case was tried to the jury in the State Court of Pennsylvania. The jury returned a verdict in favor of the plaintiff, but the Trial Court granted a Motion for Judgment Notwithstanding the Verdict on the grounds that the deceased was guilty of contributory negligence. The case was affirmed by the Supreme Court of Pennsylvania. This Court also held that contributory negligence was a defense and in this connection stated:

> "In the absence of legislation at the time of the injury complained of, taking away the defense of contributory negligence, it continued to exist, * * *."
> 220 U. S. at 597.

The Iowa Court correctly determined that this case was decisive unless it was in some manner overruled or modified by the subsequent decisions of this Court. The petitioner similarly recognizes the importance of the holding, but advances several reasons why it should not be decisive here. The petitioner suggests that the evidence in that case revealed that the plaintiff met his death by attempting to make a coupling in a dangerous way and ignored repeated warnings not to attempt such a dangerous act. He implies that the conduct of the decedent in that case

might be similar to the situation where a railroad could escape liability where an adequate coupler failed because of the work of a saboteur. The suggested distinction is not valid. In that case the plaintiff had secured a verdict from the jury and was entitled to retain that verdict unless the evidence, when viewed in the light most favorable to the plaintiff, was such that it could not be sustained as a matter of law. This Court, before reviewing the evidence to determine whether the verdict could be sustained, first differentiated between assumption of risk which sometimes shades into contributory negligence and contributory negligence, and in this connection stated:

> "Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires."

220 U. S., at 596.

In reviewing the evidence, this Court compared the decedent's conduct with the standard of ordinary care as above expressed. That standard of care conforms to the same standard which was given to the jury as their guide in the present case (A. 129-130). This is the conventional standard which has almost universal recognition and conforms with Rules 463 and 464, Restatement of Torts, Second. A fair analysis of the opinion indicates that this Court was merely comparing the conduct of the decedent with the standard of conduct which requires ordinary care. It was not endeavoring to redefine contributory negligence or to imply that in future cases contributory negligence would not constitute a defense unless the conduct of the injured party manifest a disregard of repeated warnings or was otherwise reckless. The Federal Safety Appliance Act did not touch the common or statute law of Pennsylvania concerning contributory negligence. There is no indication that this Court was endeavoring to establish a different rule than that which prevailed under the local law.

The next distinction is that there was "the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence * * *" (220 U. S. at 597). As we pointed out above, FELA, which became effective after the date of the injury in Schlemmer, now provides a source for the rule that the Safety Act bars contributory negligence from excusing the railroad for its violation of the Safety Act."

The Iowa Supreme Court in the present case was convinced that at the time of the petitioner's injury there was no legislation which affected him that took away the defense of contributory negligence. As previously indicated, the Iowa Court held that, because the petitioner was not an employee, he was not a person who was entitled to the benefits of the Federal Employers' Liability Act which would abrogate contributory negligence as a defense, but only in those cases involving injuries to railroad employees. The petitioner can point to no case which has ever held that a non-railroad employee has any rights or benefits under the Federal Employers' Liability Act. This Court has held to the contrary on many occasions.

The next case to receive consideration by this Court was **Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Popplar**, 237 U. S. 369 (1915), in which an action was brought in the State Court of Minnesota to recover damages for an injury causing death received by the decedent, a brakeman, while he was uncoupling railroad cars. At the time of the accident the decedent was engaged in intrastate commerce. The right to recover was based upon an alleged non-compliance of what is now Section 2 of the Federal Safety Appliance Act. This Court first recognized that there was no right to recover under the Federal Employers' Liability Act because the decedent was not engaged in interstate commerce. In this connection it was stated:

> In the present case a Federal question could arise only under the safety appliance act; while the cars were upon a railroad which was a highway of interstate commerce, and hence this act was applicable (Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822), it is agreed that there was no evidence that the decedent at the time of the accident was engaged in interstate commerce, and no question is presented under the employers' liability act,—an enactment which has a wider field.

237 U. S., at 371.

The Court further commented with respect to the provisions of the Safety Appliance Act, upon which the right of recovery was sought, as follows:

> The statute was concerned only in so far as it defined the duty of the company to have couplers meeting the positive requirement; it did not preclude the defense of contributory [372] negligence, as distinguished from that of assumption of risk. As this court has said:
>
> "The defense of contributory negligence was not dealt with by the statute." Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 595, 55 L. ed. 596, 599, 31 Sup. Ct. Rep. 561. Whether the rule of the company applied in such an emergency as that in which the decedent found himself,—whether he was guilty of contributory negligence as matter of law, or could be excused upon the ground that in an exceptional situation he acted with reasonable care, were questions which the Federal act left untouched.

237 U. S., at 371-372.

Thereafter there were a series of cases which came from this Court, which involved injuries to railroad employees

who were engaged in intrastate commerce, in which actions were brought to recover damages for injuries due to a violation of the Federal Safety Appliance Act. In all of those cases it was uniformly recognized that the Federal Safety Appliance Act did no more than to impose a positive duty upon the railroad to have equipment which complied with the provisions of the Federal Safety Appliance Act. It was also held that, in case of injury to those employees who were not entitled to the benefits of the Federal Employers' Liability Act, they were required to pursue their remedies in accordance with the law of the state where the injury occurred.

The petitioner is now asserting that a violation of the Federal Safety Appliance Act imposes absolute liability against a railroad in favor of all who are covered by the Act. The only basis upon which this contention can be sustained is that such a violation operates to create a federal cause of action in favor of the injured party. This Court specifically held that such was not the case.

In **Moore v. Chesapeake & Ohio Ry. Co.**, 291 U. S. 205 (1934), an action was brought in the Federal District Court of Indiana to recover for injuries which were sustained by the petitioner in the course of his employment by the respondent, an interstate carrier in the State of Kentucky. There were two paragraphs in the complaint. In the first the petitioner alleged that at the time he was injured he was employed in interstate commerce and that he brought his action under the Acts of Congress known as the Federal Employers' Liability Act and the Safety Appliance Act. In the second paragraph or count of his petition he alleged that at the time of his injury he was employed in intrastate commerce and invoked the Safety Appliance Act enacted by Congress and the Employers' Liability Act of Kentucky. The provisions of the law of Kentucky, which were alleged to govern the rights of the

parties at the time and place in question, were set forth. In each count petitioners alleged he was engaged as a switchman and that his injuries were received while he was attempting to uncouple certain freight cars due to a defective coupling lever. The railroad objected to the jurisdiction of the District Court to each count. We need not concern ourselves here with Count I, which was based upon the Federal Employers' Liability Act.

As to Count II, which related to the injuries received in intrastate commerce, respondent railroad asserted that it was a citizen of Virginia doing business in Indiana, and alleged that the cause of action set forth in the second paragraph arose under the Federal Safety Appliance Act, and that, therefore, the action could not be brought in any district other than the Eastern District of Virginia. This made it necessary for this Court to determine whether the second count of the Petition, which was based upon a violation of the Federal Safety Appliance Act, constituted a suit arising under the laws of the United States and, therefore, cognizable in the Federal Court in the absence of diversity of citizenship. If such were true, only the judicial district where the respondent railroad resided would have jurisdiction of the case. This Court, however, held that the second paragraph of the Complaint set forth a cause of action under the Kentucky statute and not a cause of action which was created by a violation of the Federal Safety Appliance Act. In reaching this conclusion, it was said:

> The Federal Safety Appliance Acts prescribed duties, and injured employees are entitled to recover for injuries sustained through the breach of these duties. Johnson v. Southern P. Co., 196 U. S. 1, 49 L. ed. 363, 25 S. Ct. 158; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. ed. 874, 36 S. Ct. 482, supra. Questions arising in actions

in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, Federal questions which may appropriately be reviewed in this Court. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 S. Ct. 616, supra; Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. ed. 931, 37 S. Ct. 456, supra. But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the Federal statute, should be regarded as a suit arising under the laws of the Unit-

*[215]

ed States and cognizable in the *Federal court in the absence of diversity of citizenship. The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original Act of 1893 made no provision for suits, except for penalties. That Act did impliedly recognize the employee's right of action by providing in § 8 that he should not be deemed to have assumed the risk of injury occasioned by the breach of duty. But the Act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 55 L. ed. 596,

31 S. Ct. 561; Minneapolis, St. P. & S. Ste M. R. Co. v. Popplar, 237 U. S. 369, 371, 372, 59 L. ed. 1000, 1001, 35 S. Ct. 609. In these respects the amended Act of 1903 made no change, notwithstanding the enlargement of the scope of the statutory requirements. The Act of 1910, by a proviso in § 4 relating to penalties (36 Stat. at L. 299, chap. 160, U. S. C. title 45, § 13), provided that nothing in that section should "be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee" caused by the use of the prohibited equipment.

The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (Texas & P. R. Co. v. Rigsby, supra, 241 U. S. 39, 40, 60 L. ed. 877, 878, 36 S. Ct. 482[6]) and was left to be enforced accordingly, or, in case of

*[216]

the death of *the injured employee, according to the applicable statute.[7] St. Louis, I. M. & S. R. Co. v. Taylor, supra (210 U. S. 285, 52 L. ed. 1064, 28 S. St. 616); Minneapolis, St. P. & S. Ste M. R. Co. v. Popplar, 237 U. S. 369, 59 L. ed. 1000, 35 S. Ct. 609, supra. When the Federal Employers' Liability Act was enacted, it drew to itself the right of action for injuries or death of the employees within its purview who were engaged in interstate commerce, including those cases in which injuries were due to a violation of the Safety Appliance Acts. Such an action must be brought as prescribed in the Federal Employers' Liability Act, and if brought in the state court, it cannot be removed to the Federal court, although violation of the Safety Appliance Acts is involved. See St. Joseph & G. I. R. Co. v. Moore, 243 U. S. 311,

61 L. ed. 741, 37 S. Ct. 278. With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts precluded the State from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this Court said in Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, supra, as to an action for injuries sustained in intrastate commerce: "The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master "at a single point and, save as provided in the

*[217]

statute, the right of the *plaintiff to recover was left to be determined by the law of the State."

We are of the opinion that the second paragraph of the complaint set forth a cause of action under the Kentucky statute and, as to this cause of action, the suit is not to be regarded as one arising under the laws of the United States. In view of the diversity of citizenship and the residence of petitioner, the District Court of the Northern District of Indiana had jurisdiction.

291 U. S., at 214-217.

The petitioner contends that because his rights arise from the violation of a Federal Statute, Federal law governs what defenses are available under that statute and he makes mention of the case of Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41-42 (1916), and Boyer v. Atchison, Topeka & Santa Fe Ry. Co., 38 Ill. 2d 31, 230 N. E. 2d 173, 176 (1967), cert. denied, 390 U. S. 949 (1968).

It will be noted that this Court, in the Moore case, supra, placed a different interpretation upon the holding in the Rigsby case when it said that the Safety Appliance Act, having prescribed the duty, "the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law." 291 U. S., at 215. And, also when it said that the Federal Safety Appliance Act touched the duty "* * * at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state."

The Boyer case also cited by petitioner does not support his claim that a violation of the Federal Safety Appliance Act gives rise to a federally created cause of action. On the contrary, it is there stated:

> "It is, however, settled that the cause of action arising from a breach of the Act is not a Federal cause of action and consequently one in whose favor such a cause of action has arisen must look to the State courts to implement his right of action. * * *" 230 N. E. 2d at 176.

This Court, likewise, in **Gilvary v. Cuyahoga Valley R. Co.**, 292 U. S. 57 (1934), again held that a violation of the Federal Safety Appliance Act, which resulted in injury to an intrastate railroad employee, did not create a cause of action in favor of that employee. This Court held that the petitioner was accordingly bound by the provisions of the Ohio Workmen's Compensation Act in securing compensation for the injuries which he received for a violation of the Safety Appliance Act when a car was not equipped with couplers coupling automatically by impact. The Court in reaching this conclusion states:

> A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize

the right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employers' Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (U. S. C., title 45, § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect to venue, jurisdiction of courts, limitations, measures of damages and beneficiaries in case of death.

Petitioner cites language in Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 41, 60 L. ed. 874, 878, 36 S. Ct. 482. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach "sprang from the principle of the common law" and was left to be enforced accordingly, or in case of death "according to the applicable statute." Moore v. Chesapeake & O. R. Co., 291 U. S. 205, ante, 755, 54 S. Ct. 402, supra; Minneapolis & St. P. R. Co. v. Popplar, 237 U. S. 369, 372, 59 L. Ed. 1000, 1001, 35 S. Ct. 609.

These Acts do not

*[62]

create, *prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act.

292 U. S., at 61-62.

It should be noted that the Court pointed out that the Rigsby case upon which petitioner relies should not be interpreted as an authority that Federal law determines the availability of defenses in a non-employee safety act suit in a state court.

The next case upon which the Iowa Court relied is **Fairport, P. & E. R. Co. v. Meredith,** 292 U. S. 589 (1934). In that case, for the first time, the provisions of the Federal Safety Appliance Act were extended to and for the benefit of a person who was not a railroad employee. The respondent recovered judgment upon the verdict of a jury in an Ohio State Court for personal injury resulting from the collision at a railroad-highway crossing between an automobile which she was driving and a train which was operated by the petitioner over its line of railroad. The basis upon which recovery was sought was a violation of the Federal Safety Appliance Act which required trains to be equipped with air brakes. The Court held that the petitioner in that case was entitled to the benefit of the provisions of the Federal Safety Appliance Act because they were enacted not only for the protection of railroad employees and passengers on railroad trains, but for the benefit of the public generally. In that case the railroad claimed that an instruction which was given by the trial court in respect to the doctrine of last clear chance did not correctly state the law. This Court refused to review this ruling because it did not present a federal question, and in this connection stated:

> The holding of the court below as to the doctrine of the last clear chance is challenged as being contrary to the weight of American author-
>
> *[598]
>
> ity;[3] but we are *precluded from considering the contention because it does not present a federal question. The federal Safety Appliance Act, as we already have

said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 214 et seq., ante, 755, 761, 54 S. Ct. 402, and cases cited; Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, ante 1123, 54 S. Ct. 573. And see Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. ed. 681, 27 S. Ct. 407, upon second appeal, 220 U. S. 590, 598, 55 L. ed. 596, 600, 31 S. Ct. 561. The same is true of the doctrine of the last clear chance, which likewise is not affected by the act.

292 U. S., at 597-598.

One further case is cited by the Iowa Court, and the following comment from the opinion provides an accurate summary of the situation:

In Tipton v. Atchison, Topeka and Santa Fe Ry. Co., 298 U. S. 141, 146, 56 S. Ct. 715, 80 L. Ed. 1091 (1935), the court held California was at liberty to afford any appropriate remedy for breach of the duty imposed by the S. A. A. and could limit plaintiff's recovery to workmen's compensation. The court said:

"The Safety Appliance Acts impose an absolute duty upon an employer * * *. The absolute duty imposed necessarily supersedes the common-law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance

> Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employee's common-law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act." 298 U. S. at 146, 56 S. Ct. at 716.

The U. S. Supreme Court has not overruled or modified these clear holdings.

(A. 138).

By way of summary, it may be stated that from the time of the first case which appeared in this Court involving a construction of the Federal Safety Appliance Act until the final decision from which quotation is made above in the year 1935, it was uniformly held that the Federal Safety Appliance Act did not create a cause of action in favor of any person who might be injured as a result of the violation of that Act. In the absence of rights which were conferred by the Federal Employers' Liability Act, the injured party was required to look to the law of the state where the injury occurred for a remedy. This was true even as to railroad employees who were engaged in intrastate commerce at the time of injury. In 1939 the Federal Employers' Liability Act was amended to extend the scope of its coverage to additional employees as follows:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall; for the purposes of this chapter, be considered as being employed

by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U. S. C. A., Section 51.

Although the scope of the Federal Employers' Liability Act was extended to cover additional employees of the carrier, there is no basis on which it can be claimed that its benefits were extended to one such as the petitioner, Crane, who was not in any manner employed by the respondent at the time of his injury.

This review of the prior decisions of this Court discloses that the petitioner has not accurately interpreted those decisions and is not justified in stating that "the Iowa Court followed statements in earlier decisions by this Court which, at least without reference to their context, seem to support the railroad's position." Unless these prior decisions are overruled by this Court, there must be an affirmance of this case.

IV.

We shall now direct attention to this Court's more recent rulings referred to by the Iowa Court which the petitioner suggests expressed the intent of Congress to impose absolute liability regardless of who brings the suit.

The petitioner relies upon **O'Donnell v. Elgin, Joliet & E. R. Co.**, 338 U. S. 384, 389 (1949), for the proposition that this Court ruled twenty years ago that its "early decisions swept all issues of negligence out of cases under the Safety Appliance Act." The petitioner again implies that this case reflects a different interpretation of the Safety Appliance Act. There is nothing contained in that case which is indicative of the intention to depart

from the prior constructions of the law. In fact, the cases cited in connection with the excerpts from the opinion upon which the petitioner relies indicate the contrary, it being said:

> But usually, unless the statute sets up a special cause of action for its breach, a violation becomes an ingredient, of greater or lesser weight, in determining the ultimate question of negligence.
>
> But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. St. Louis & Iron Mountain & S. R. Co. v. Taylor, 210 U. S. 281, 294, 52 L. ed. 1061, 1067, 28 S. Ct. 616; Chicago, B. & Q. R. Co. v. United States, supra (220 U. S. 575-577, 55 L. ed. 588, 589, 31 S. Ct. 612); Delk v. St. Louis & San Fran. R. Co., 220 U. S. 580, 55 L. ed. 590, 31 S. Ct. 617. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not
>
> *[391]
>
> *excused by any showing of care however assiduous." Brady v. Terminal R. Asso., 303 U. S. 10, 15, 82 L. ed. 614, 618, 58 S. Ct. 426.

338 U. S., at 390-391.

There is nothing which would indicate an intention to overrule the decisions of this Court which were decided subsequent to those cited. These previous cases held

that the Federal Safety Appliance Act standing alone did not set up a special cause of action for its breach. Its violation became an ingredient in determining whether the injured party had a cause of action under the law of the state where his injury occurred. The fact that the liability of the carrier may be in part based upon a statute which imposes an absolute duty does not create absolute liability. Absolute liability does not result unless some statute sets up a special cause of action for its breach. When a case is brought by a railroad employee which is based upon a violation of the Federal Safety Appliance Act, the situation arises with "the violation of the appliance act supplying the wrongful act necessary to ground liability under the F. E. L. A. See Moore v. Chesapeake & Ohio E. Co., 291 U. S. 205, 216, 78 L. ed. 755, 762, 54 S. Ct. 402 (1934); O'Donnell v. Elgin, Joliet & Eastern R. Co. (U. S.), supra; * * *."

Carter v. Atlanta & St. A. B. R. Co., 338 U. S. 430, at 434 (1949).

When these cases are read together there is no question but what the Federal Safety Appliance Act violation will not alone result in the imposition of absolute liability. The liability, instead, flows to the railroad employee because of the special cause of action which is created in his favor by the Federal Employers' Liability Act. The Carter case obviously did not intend to change any construction of the law from that stated in the Moore case which it cites. It was there specifically stated:

> "The statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law." 291 U. S., at 214.

Affolder v. New York C. & St. L. R. Co., 339 U. S. 96 (1950), was likewise a case in which the action was brought by a railroad employee based on an alleged vio-

lation of the Federal Safety Appliance Act and the Federal Employers' Liability Act. In these cases, if the employee is able to establish a violation of the Federal Safety Appliance Act, and is able to show that the defendant's breach was "a contributory proximate cause of the injury," the plaintiff is entitled to recover. It will be observed that a more favorable rule of causation is created under the Federal Employers' Liability Act than would exist under applicable state law because "Congress has directed liability if the injury resulted in whole or in part from defendant's negligence or its violation of the Safety Appliance Act." **Carter v. Atlanta & St. A. B. R. Co.**, 338 U. S. at 435.

An analysis of these cases requires the conclusion that they did not in any manner overrule or modify the prior holdings of this Court where action was not brought under the Federal Employers' Liability Act.

There are two other cases upon which the petitioner relies as the basis for his claim that a violation of the Federal Safety Appliance Act imposes absolute liability upon the carrier in favor of a non-railroad employee. The first of these cases is **Brady v. Terminal R. R. Association**, 313 U. S. 10 (1938). The petitioner claims that this case imposed absolute liability on the carrier in favor of one who was not an employee of that carrier. He points to the language in that opinion by Chief Justice Hughes to the effect that:

> The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 S. Ct. 616; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 570, 55 L. ed. 582, 586, 31 S. Ct. 612; Louisville & N. R. Co. v. Layton, 243 U. S. 617,

620, 621, 61 L. ed. 931, 933, 934, 37 S. Ct. 456; Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. ed. 322, 36 S. Ct. 124, supra. The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 S. Ct. 2, 3 N. C. C. A. 822.

303 U. S. 15.

As in the O'Donnell case, supra, the cases cited are those early decisions of this Court, most of which were prior in time to the numerous holdings that this statutory liability which resulted from the absolute duty imposed upon the carrier did not create a cause of action in favor of a non-railroad employee. Certainly the Brady case, in which the opinion was written by Mr. Chief Justice Hughes, is not indicative of any departure from the rules of law which were stated in the opinion of Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Popplar, 237 U. S. 369, at 371-372, or in Moore v. Chesapeake & Ohio Ry. Co., 291 U. S. 205, 216, both of which were delivered by him. In the Brady case the petitioner recovered a judgment in the Missouri State Court, which was reversed by the Supreme Court of Missouri, which rendered a final judgment in favor of the respondent railroad. The petitioner in that case was employed as a car inspector by another railroad and received his injury while he was engaged in the course of his duties of inspecting a car. The first question which was considered was whether the car was in use by the respondent at the time in question, and also whether the responsibility of the respondent with respect to the car had ended. Those questions are not presented here. The Court then held that petitioner was entitled to predicate his right to recover under the Safety

Appliance Act and cites in support of this conclusion, among other cases, Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 596-597. It will be noted that this is the same case in which this Court previously had held that a person who was injured at a railroad crossing as the result of the violation of the Federal Safety Appliance Act was entitled to base a right to recover under that Act. That case, however, likewise held that this violation did not create a Federal cause of action in favor of the injured traveler. The question of whether Brady was guilty of contributory negligence was not before the Court and, of course, could not have been decided because Brady had recovered a verdict in the trial below and there was no claim upon the appeal that he should have been denied recovery because he was guilty of contributory negligence as a matter of law. The Iowa Court was correct in its analysis of the Brady case.

The next case is **Shields v. Atlantic Coast Line R. Co.**, 350 U. S. 318 (1956). In that case the only question presented for decision by this Court was whether the dome running board on top of a railroad car, which gave way and caused injury, was a safety appliance within the meaning of the Safety Appliance Act. 350 U. S., at 319. After concluding that it was such a safety appliance, the opinion was concluded with the following language:

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. Coray v. Southern Pacific Co., 335 U. S. 520, 93 L. ed. 208, 69 S. Ct. 275; Brady v. Terminal R. Asso., 303 U. S. 10, 82 L. ed. 614, 58

S. Ct. 426; Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 78 L. ed. 1446, 54 S. Ct. 826, 35 N. C. C. A. 388; Louisville & N. R. Co. v. Layton, 243 U. S. 617, 61 L. ed. 931, 37 S. Ct. 456. The judgment below must be reversed and the judgment of the District Court reinstated.

Reversed.

350 U. S., at 325.

It is this quoted language upon which the petitioner relies as the basis of a claim that a non-railroad employee, if injured as the result of a defective safety appliance, has a right to recover irrespective of his own contributory negligence. The specific language is "as to him the violation of the statute must therefore result in absolute liability." Under the facts of that particular case, once it was determined that the statute had been violated, liability followed because there was no issue before the Court concerning any defense which might be available to the carrier. In that case the petitioner, as in the Brady case, had recovered a judgment after trial by the jury. The verdict in his favor was set aside by the Court of Appeals solely on the ground that the dome-step or platform was not a safety appliance. 220 Fed. 2d 242, at 245. It will be noted that the Fairport case, 292 U. S. 589, is one of the cases cited in support of the conclusion reached. That case held that the Safety Appliance Act would convert the "qualified duty imposed by the common law into an absolute duty, from violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the Act." 292 U. S., at 596. At the same time it also said "but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The Act does not affect the defense of contributory negligence." When the Shields case is examined in this light, there is no possible basis for the claim that it intended

to change the rules of law which were expressed in the Fairport case. We have now considered and analyzed all the so-called more recent rulings which were referred to by the Iowa Court, but which the petitioner claims the Iowa Court did not correctly interpret. It is submitted that the Iowa Court correctly analyzed these cases and properly concluded that they did not support the contention which was being made with respect to absolute liability and that the issue of contributory negligence was not in these cases and was not mentioned in the opinions.

V.

The petitioner quotes from "The Safety Appliance Act and the FELA: A Plea for Clarification," 18 Law & Contemp. Prob. 281, 290-91 (1953). This article was written by two Law Professors of the University of Minnesota. They suggest at page 291:

> "Thus the O'Donnell, Carter, and Affolder cases, the most recent Supreme Court cases which analyze the nature of a Safety Appliance Act cause of action, are at least implicit authority for the proposition that the contributory negligence of the injured person is no defense to an action under this Act. * * *"

They recognize in their article that the Federal Safety Appliance Act does not create a federal cause of action independent of the Federal Employers' Liability Act. These authors concede that there is no basis for any implication such as they suggest unless the Federal Safety Appliance Act is a statute of the kind which would give injured persons benefits that are comparable to workmen's compensation coverage for industrial employees. The authors then, at pages 293 to 295 of their article, set forth four very cogent reasons why this Court may well conclude that contributory negligence is still available as a defense to an action brought by a non-railroad employee. They may be briefly summarized as follows:

"(1) As already noted, the O'Donnell, Carter and Affolder cases were based on both the FELA and the Safety Appliance Act. The plaintiffs in all three cases were railroad employees. * * *

"(2) At earlier times the Supreme Court clearly had held that contributory negligence of the plaintiff is a defense to an action grounded upon violation of the Safety Appliance Act. * * *

"(3) Arguments based on statutory construction could provide an escape hatch. Thus, it can be argued that if the Safety Appliance Act had abolished the defense of contributory negligence, why the necessity for its express abolition by the FELA in 1908? * * *

"(4) As already noted, under the FELA there is sufficient causation to hold the railroad if the injury results 'in whole or in part' from its conduct. In other words, it is sufficient if the railroad's conduct was a 'contributing cause' of the injury. But there is nothing in the Safety Appliance Act which precludes a court from applying the orthodox standard of 'proximate cause.' Hence, even if the Supreme Court is committed by the O'Donnell, Carter, and Affolder cases to the abolition of contributory negligence as a defense in a suit grounded on the Safety Appliance Act, it would always be possible for the Court in a hard case, while disclaiming the terminology of contributory negligence, to permit its substance to be a good defense by speaking in terms of plaintiff's conduct as preventing the railroad's violation of the Act from being the 'proximate cause' of the injury."

The present case represents an instance where the petitioner by his own unskillfulness in the management of the railroad cars produced a situation where adequate couplers, which were in full compliance with the statute,

failed to function solely because they were not properly set to couple at the time of the impact between the cars which was caused by use of a winch. The coupling was attempted on a sharp curve in the track and there is no showing that the knuckle on the coupler which swung to the outside of the curve was open and the knuckle that swung to the inside of the curve was closed, which is the proper setting for couplers on a curve of that type (A. 106). A situation such as this was exactly what was in mind in the O'Donnell case, supra, when the statement was made in Footnote 7, 338 U. S., at 394:

> "• • • And we do not find it necessary to consider a situation where an adequate coupler failed to hold because it was improperly set, since such facts are not before us."

VI.

The petitioner in the present case contends that, in accidents occurring after the effective date of the Federal Employers' Liability Act, there is no basis for finding that Congress could have intended that the common law excuse of contributory negligence could be used to thwart the purpose of the Safety Act. The petitioner contends, even in actions brought by a non-railroad employee, that:

> "• • • this Court may properly find in FELA the rule governing contributory negligence as a defense in Safety Act suits.
>
> "Nothing in the history of either Act militates against this view. On the contrary, while most of the discussion in Congress obviously was about employees, since they were the group most likely to suffer injury, there is not a word in the legislative history of either the Safety Appliance Act or FELA to suggest that Congress intended to distinguish between employees and non-employees insofar as con-

tributory negligence is concerned. Respondents has cited none. * * *"

It is, no doubt, proper for this Court to consider the legislative history of both the Federal Safety Appliance Act and the Federal Employers' Liability Act in order to reach a proper interpretation of these Acts. However, when Congress specifically abrogated contributory negligence as a defense only in cases brought by railroad employees, when it enacted what is now Section 53 of the Federal Employers' Liability Act, 45 U. S. C., Section 53, it can be scarcely claimed that it deliberately intended to abrogate contributory negligence in all actions which might be brought against a common carrier by railroad by any injured person even though that injured person was not an employee.

As we have previously pointed out, this Court initially construed the Federal Safety Appliance Act in a manner which negatived the intent of Congress to adopt what would be comparable to a general workmen's compensation act even as to railroad employees. These early cases held that, in actions brought by railroad employees prior to the adoption of the Federal Employers' Liability Act, contributory negligence still remained available as a defense. When the Federal Employers' Liability Act was originally adopted, it abrogated contributory negligence as a defense, but only as to interstate employees. The effect of the Federal Employers' Liability Act was only to abrogate contributory negligence as a defense in those cases specifically provided, but to still leave untouched the defense in actions brought by intrastate employees. Congress amended the Federal Employers' Liability Act in 1939 to extend its protection to a broader field of railroad employees. Again, however, it was specifically stated that only those employees of a carrier "whose duties as such employee shall be in the furtherance of interstate or foreign

commerce, or shall, in any way directly or closely and substantially affect such commerce," shall be entitled to the benefits of Chapter 45 of the Code. 45 U. S. C., Section 51. "The 1939 amendment was designed to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike." **Reed v. Pennsylvania R. Co.**, 351 U. S. 502, at 505 (1956). The petitioner, however, contends that, even after such amendment, there is no distinction as to the coverage under the Federal Employers' Liability Act between employees and non-employees.

VII.

This Court has at all times held that the Federal Safety Appliance Act is not a statute of a class which was adopted for the sole purpose of shifting the burden of protecting all persons against injury caused by defective appliances onto the shoulders of the railroad irrespective of the conduct of the injured party. The absolute duty imposed upon the carrier is a duty which it owes to all persons who may receive injury as a result of its breach. The breach of the duty, however, does not alone make the railroad liable. In the case of persons who are not railroad employees, who are injured as a result of a defective appliance, liability has at all times been dependent upon the further condition that the injured person has not been guilty of fault contributing to his injury which is within the sole control of the injured party. It is only in the case where the injured party is a railroad employee who is entitled to bring his cause of action under the Federal Employers' Liability Act that the question of fault contributing to injury has been eliminated as a defense.

VIII.

The petitioner argues that there is no valid basis for differentiating between injuries received by railroad em-

ployees and injuries which might be received by the shipper's employees. It is asserted that such a difference in treatment is absurd because the regular railroad employee is far more experienced in handling railroad equipment and thus far more familiar with the hazards of its use than the shipper's employee, and as a result there is no basis for the imposition of absolute liability in favor of railroad employees and at the same time holding the non-employee accountable for his own mistakes and defeating his right to recover. One ready answer to such an argument is, that in the present case no accident would have ever occurred if a person experienced in handling railroad equipment had been engaged in moving the cars. The evidence offered by witnesses on both sides established that no one who had any familiarity at all with railroad couplers or the movement of railroad cars would attempt to move railroad cars without first looking to see whether the coupling pin had dropped. The dropping of the pin was necessary to effect a coupling of the cars (A. 59-60) (A. 103). If a person were not standing alongside the cars where he could make such an observation to determine whether the pin had dropped, he would not attempt to move the cars without first taking up the stretch to be certain that all cars in the string were securely coupled (A. 60). In the present case the petitioner made no such observation. In fact, he said he knew very little, if anything, about couplers (A. 39).

IX.

No impelling social reason exists which would permit a departure from the conventional rules of common law liability in order to impose absolute liability upon the respondent in the present case. In this case the petitioner was employed by Cargill, Inc. at Cedar Rapids, Iowa, as a mill helper. One of the duties of his employment was

to load meal into railroad cars which were delivered by the respondent to the Cargill Elevator in Cedar Rapids. Part of the duties of petitioner's employment in connection with the loading of railroad cars was the weighing and spotting of these cars at the proper loading doors (A. 3). The work in which the petitioner was engaged at the time of his injury in moving the cars on the meal house track between the loading dock and the Cargill elevator scales was entirely a Cargill operation. At that time the petitioner and one, Harris, were employees of Cargill and were under the immediate supervision and charge of their Cargill foreman. The railroad had nothing to do with what they did and the railroad did not have any right to direct or control their activities (A. 82-83). The railroad cars, at the time they were set out on the siding at the Cargill plant, were all equipped with couplers which were functioning in the usual and ordinary manner. The petitioner himself observed the two cars in question at the time they were uncoupled for the purpose of being moved by means of the winch to the Cargill scale, where they were to be weighed and then brought back by means of the winch to the loading dock for the purpose of being loaded with meal (A. 26). At the time these cars were uncoupled for the purpose of being taken to the scales for weighing, the petitioner observed his co-employee lift up on the pin lifter which opened the couplers between the two cars, which were subsequently attempted to be recoupled, and at that time he knew that those cars were equipped with couplers that were functioning in the usual and ordinary way that couplers were supposed to operate. They were coupled together and could be uncoupled without the necessity of anybody going between the cars to uncouple them (A. 32). When the cars which were weighed were brought back for subsequent loading, it was not necessary that they again be recoupled in order to enable their being loaded and subsequently hauled away. The

attempt to recouple them was solely a matter of convenience to the petitioner and was done so that they would not have to carry the hook back so far when later cars were moved in front of the loading dock for the purpose of being loaded (A. 33).

The activities in which the petitioner and his co-employee were engaged were carried out on a track at the Cargill plant. The car movements were made in an area entirely by means of the use of a winch which was supplied by Cargill. No cars were ever moved in this area by means of a locomotive (A. 78). The respondent did not claim to own the track on which these movements by the Cargill employees were engaged and never claimed the right to direct or control the movement of any railroad cars in that area. It had no papers of any kind relating to the ownership of the tracks in that area. It merely set out empty cars on what was referred to as the meal house track at the Cargill plant. These cars were set out on the south end of this meal house track, and that was the end of the railroad's handling of those cars until Cargill released them to the railroad on that same track north of the elevator. No representative of the railroad who had any authority to make arrangements with Cargill concerning the use of the railroad cars delivered to Cargill ever saw anybody recouple a railroad car after it had been uncoupled by the Cargill employees. The winch which was used to move these cars revolved at a constant rate and would move them at about a speed of one-half mile per hour. In experiments which were made to determine the maximum speed at which cars could travel on the meal house track after they were set in operation by means of the winch, the highest speed ever attained was 1.79 miles per hour at any point during the time those cars were traveling between the meal house dock and the elevator shed (A. 111-112).

These railroad cars were set in operation by the petitioner and his co-employee, Harris, by means of the winch without making any observation to first ascertain whether the coupling pin had dropped, which was necessary in order for the cars to be securely coupled together. When the petitioner observed that the first two cars which were set in operation by the winch were moving away, and were not coupled to the remainder of the string, he overtook the southernmost of the two moving cars, got up on the brake platform, and was engaged in turning the brake wheel on that car when for some unknown reason he lost his balance and fell from the top of the car. Nothing gave way on that car which caused him to fall (A. 35-36). On the basis of such record there is no possible theory on which it could be claimed that the petitioner was performing work for the respondent railroad. In fact, the duties which he and his co-employee were performing were of a nature which could not be lawfully performed by the respondent railroad for Cargill without a charge to Cargill. If such work had been performed by the respondent without charge, or if compensation had been made to Cargill for the work which was being performed by the petitioner, it would have constituted an unlawful discrimination by the railroad.

Merchants Warehouse Co. v. United States, 283 U. S. 501, at 510-511 (1931);

United States v. American S. & T. Plate Co., 301 U. S. 402, at 407-408 (1937).

X.

The construction for which the petitioner now contends would bring about a result which is exactly contrary to the express intent of Congress. If contributory negligence were not available as a defense by the respondent railroad, it would result in shifting the burden of this industrial accident, in part at least, from the

shoulders of the petitioner's employer to that of the respondent railroad. The manifest injustice of such a situation is fully demonstrated by what occurred at the time of trial in the present case. The transcript of the Court Reporter, which was made at the time of the interrogation of prospective jurors, will disclose that there was present upon the jury panel a man known as McWhinney who was an agent of the Travelers Insurance Company in the City of Cedar Rapids, Iowa. At the request of the petitioner the respondent was specifically forbidden from asking Mr. McWhinney whether he was in any manner connected with the Travelers Insurance Company which had written the Iowa Workmen's Compensation coverage on the petitioner's employer, Cargill, Inc. Under Iowa law, the amount which was paid by the Travelers Insurance Company to the petitioner under the provisions of the Iowa Workmen's Compensation Act would be required to be repaid by the petitioner "out of the recovery of damages to the extent of the payment so made, with legal interest." In the present case the action, although brought in the name of the employee, he would be required to hold the amount of such recovery and pay over the same to the Travelers Insurance Company.

> **Price v. King**, 255 Iowa 314, at 318, 122 N. W. 2d 318, at 321 (1963).

The trial court, in forbidding the respondent to interrogate Mr. McWhinney concerning his connections with the Travelers Insurance Company, was following the prior pronouncements of the Iowa Court which have held it is improper for a defendant in an action brought by an employee to in any manner show that such employee was under the coverage of the Iowa Workmen's Compensation Law at the time of the injury. The Iowa Court has held that the amount of the award under the Workmen's Compensation Act has nothing to do with the liability

of a third person to the injured employee or the amount of damages which such injured employee should be entitled to recover against the third party defendant. This is the result under Iowa Law even though the employee is required to hold the amount of such recovery, in part at least, for the benefit of the workmen's compensation insurer.

Cawley v. Peoples Gas & Electric Co., 193 Iowa 536, at 549, 187 N. W. 591, at 598 (1922).

In the present case it is obvious that the Federal Safety Appliance Act should not be interpreted in a manner different than in accordance with the common law principles of liability. This is not a case where the rules expressed by this Court in **Sinkler v. Missouri P. R. Co.**, 356 U. S. 326, at 329-330 (1958) can be applied. The petitioner was not a railroad employee. The cost of injury to him was not an expense of railroading which should be borne by the respondent railroad, but instead a cost which should be borne by his employer, Cargill, Inc., under the provisions of the Iowa Workmen's Compensation Law. There is certainly no justice in any rule of law which would permit the Travelers Insurance Company, which was compensated for the very purpose of assuming and paying such a risk, to pass that responsibility onto the respondent railroad. This is not a case where the petitioner was a railroad worker who was daily exposed to the risks inherent in railroad work, who was helpless to provide adequately for his own safety. It is instead an instance where a part of the burden which arose from an unfortunate industrial accident caused by the negligence of the petitioner would be shifted from an insurance company which was paid to assume the risk to the shoulders of the respondent railroad which was entirely free from any negligence.

The case of **Reed v. The Yaka**, 373 U. S. 410 (1963), is in no manner analogous to the present case. In this case

the petitioner at the time of his injury was not performing the work of the respondent railroad. The respondent had no voice in his selection. It had no right to direct or control his activities. In fact, it had no knowledge that any persons would attempt to recouple the railroad cars. The petitioner was performing work which was entirely that of his employer, Cargill, Inc. The winch and cable which were being used were supplied by his employer, Cargill. The spotting and the loading of the railroad cars was not only an activity which was entirely that of Cargill, it was an activity which it would have been unlawful for the respondent to perform.

The petitioner can point to no statute, either Federal or State, which would permit non-railroad employees to be placed in the same category as railroad employees. This is not a case where the petitioner at the time of his injury was performing a service for the respondent railroad, but was receiving his pay from Cargill. It may well be that Cargill failed to discharge its duties towards petitioner by giving him inadequate instruction or warning concerning the duties which he was called upon to perform. If the injury to the petitioner was the result of such breach of duty by Cargill, there is no reason why the respondent should be held answerable for such a breach. There is no manner in which the respondent, if held liable in this case, could pass the burden back to Cargill or to its workmen's compensation carrier. There is no basis from either a social or economic standpoint which would justify the imposition of liability upon the respondent railroad in the present case.

XI.

The underlying social philosophy which accounts for a departure from the ordinary common law principles of liability in workmen compensation acts and in the Federal Employers' Liability Act is entirely absent from the

present case. The situation here is more nearly analogous to that which was presented in the very recent case of **Edwards v. Pacific Fruit Co.**, 390 U. S. 538 (1968), where the plaintiff brought an action to recover under the Federal Employers' Liability Act from his employer, a refrigerator car company, for injuries sustained in the course of his employment. The question presented in that case was whether the respondent, Pacific Fruit Express Company, was "a common carrier by railroad" as the words "common carrier" were used in the Federal Employers' Liability Act, 45 U. S. C., Section 51. This Court used language in that opinion which provides a complete answer to the contention of the petitioner that he should be accorded the status of an employee under the Federal Employers' Liability Act solely because "he was doing work on or about the respondent's railroad cars." It was there pointed out that Congress was fully familiar with the situation "that there were present on interstate trains persons engaged in various services for other masters." And further, that Congress did not "use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act. 390 U. S. 541-542. That opinion also points out other significant circumstances which are equally applicable to the present case. At the time of the 1939 amendment to the Federal Employers' Liability Act, Congress was certainly cognizant of the prior decisions of this Court which had construed the Federal Safety Appliance Act and held that it was not applicable to confer a right of action upon those railroad employees who are engaged in intrastate commerce, which would operate to abrogate the defense of contributory negligence. One of the obvious purposes of the 1939 amendment was to extend the scope of the Federal Employers' Liability Act to abrogate that defense as to all railroad employees. The wording of that 1939 amendment clearly negatives any congressional intent to

extend the coverage of the Federal Employers' Liability Act to activities of those who might be associated with the business of common carriers by railroad, but who were not railroad employees. However, more cogent than all of the other reasons advanced is the fact that, during the many years since the adoption of the Federal Employers' Liability Act and the Federal Safety Appliance Act, they have never been construed in a manner which would permit the shifting of responsibility from an employer under a state compensation law to a railroad which was not an employer of the injured person. That is precisely what the petitioner asks in the present case.

The following language in **Edwards v. Pacific Fruit Co.**, 390 U. S. 538, at 543 (1968), should provide the answer in the present case. It was there said:

> "* * * The question of whether employees shall rely on state compensation or on the Federal Employers' Liability Act is a pure question of legislative policy, concerning which apparently even the labor organizations most interested have been divided. Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress."

The prior decisions of this Court have uniformly held that the Federal Safety Appliance Act standing alone was not legislation of the type which would confer a right of recovery upon all injured persons irrespective of whether those persons had been guilty of fault contributing to their injury. It is only in those cases where the injured party was a railroad employee, and therefore had a specific cause of action created in his favor under the Federal Employers' Liability Act, that the conduct of such injured party was no longer a significant circumstance on the issue of liability. This resulted solely because of the specific provisions of 45 U. S. C., Section 53.

XII.

The petitioner deals at considerable length in a discussion of the confused and chaotic enforcement of the Act that would result if this Court were to adopt the view of the Iowa Supreme Court and hold that contributory negligence was available as a defense. It is suggested that, if contributory negligence is available to railroads in suits by non-employees, so are all the other common law and statutory defenses applicable in negligence suits in the various states. Perhaps the most satisfactory answer to this argument can be found in the fact that not a single case has been cited where any defense other than contributory negligence has been availed of since the Safety Appliance Act was first adopted in 1893. Equally significant is the fact that there have only been three cases which have ever reached this Court which have involved actions brought by persons who were non-railroad employees. If this Court were to now hold that contributory negligence was abrogated as a defense in all cases, the volume of litigation would, no doubt, substantially change.

XIII.

If this Court were to overrule the holding in **Fairport, P. & E. R. Co. v. Meredith**, 292 U. S. 589 (1934), and now hold that all persons who were injured in railroad crossing accidents could not be barred from the right to recover on the ground of their own contributory negligence, if their injuries were caused by a defective safety appliance, a condition of general chaos would result. The injured party, who took no precautions at all for his own safety before driving onto a railroad crossing in front of a rapidly approaching train, would have little difficulty in generating a jury question on the issue of liability under the Federal Safety Appliance Act.

This Court has very wisely held that it is not necessary for an injured party to establish that there was a defect in the item of equipment in order to present a case under the Federal Safety Appliance Act. All that is necessary for him to show is that the particular appliance in question failed to function "when operated with due care in the normal, natural, and usual manner."

Myers v. Reading Co., 331 U. S. 477, 483 (1947).

If the petitioner's construction of the Federal Safety Appliance Act were adopted, all that would be essential for a plaintiff to prove, in order to establish absolute liability on the railroad, would be that, if the brakes on the train had been functioning in the normal, natural, and usual manner at the time of the collision, no accident would ever have occurred. In such a case it would be the duty of the trial court to instruct the jury, as was done in the present case, that proof the mechanism worked efficiently and properly, both before and after the occasion in question, should not be considered in determining whether the railroad had violated the requirements of the Federal Safety Appliance Act. If such an interpretation as that requested were placed upon the Federal Safety Appliance Act, it would be done in violation of all the congressional purposes which have justified the liberal interpretation placed upon the Federal Employers' Liability Act. The circumstances which justified a departure from the common law principles of liability in interpreting the Federal Employers' Liability Act are entirely absent when an attempt is made to extend the scope of that Act to non-railroad employees.

XIV.

It may be permissible for Congress to impose liability without fault upon railroads in favor of persons other than railroad employees who take no precautions for their

own safety. Such a result, however, should come from a clear act of Congress rather than by changing rules of construction which have prevailed for over half a century.

CONCLUSION.

The Supreme Court of Iowa was correct in holding that the defense of contributory negligence was available in an action brought by a non-railroad employee to recover for injuries caused by a violation of the Federal Safety Appliance Act. The case should be affirmed.

Respectfully submitted,

WILLIAM M. DALLAS,
526 Second Avenue S. E.,
Cedar Rapids, Iowa 52406,

JOHN F. GASTON,
Security Building,
Cedar Rapids, Iowa 52406,
Counsel for Respondent.